1992

State of Utah v. Troy N. Passey : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff, and Appellee vs. TROY N. PASSEY, Defendant, and Appellant	BRIEF OF APPELLEE Case No. 920267-CA Priority No. 2

BRIEF OF APPELLEE

Response to the defendant's appeal of a denial of the defendant's Motion to Dismiss for lack of probable cause to arrest in prosecution for driving under the influence of alcohol, a class B misdemeanor, in violation of Section 41-6-44 of the Utah Code Annotated (1953 as amended), in the Third Circuit Court in and for Salt Lake County, West Valley Department, State of Utah, the Honorable William A. Thorne, presiding.

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this court pursuant to § 78-2a-3(2)(d) Utah Code Ann. (1992 Supp.). See, State v. Humphrey, 823 P.2d 464, 467 (Utah 1991).

STATEMENT OF THE ISSUES

1. Whether blood tests results made from a blood sample acquired subsequent to an invalid arrest are admissible where the appellant voluntarily consented to the blood sample and where the appellant's consent was acquired independent of the invalid arrest.

STANDARD OF REVIEW

1. "Because of the trial court's advantageous position in determining the factual basis for a motion to suppress, that determination should not be reversed unless it is clearly erroneous." State v. Holmes, 774 P.2d 506, 509 (Utah App. 1989) (citing State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987). Thus, unless the trial court's ruling was clearly in error, the court's

decision to grant or deny the motion should be upheld. State v. Roth, 827 P.2d 255, 256 (Utah App. 1992).

STATEMENT OF THE CASE

Appellee stipulates to the appellants statement of the case.

STATEMENT OF THE FACTS

1. On or about October 27, 1991, the Appellant, Troy N. Passey, was traveling southbound on SR-215, south of 4400, when his truck left the road and lodged in a culvert on the westside of the roadway. (Tr. p. 6)

2. Shortly after the accident, Officer David Popelmayer of the Utah Highway Patrol arrived on the scene of the accident. He observed the appellant's car in the culvert, and damage to a fence and sign that was caused by the car's path. (Tr. p. 7).

3. Upon the arrival of Officer Popelmayer, the defendant was being placed in ambulance. As the defendant was being placed in the ambulance, his identification was secured and he was identified as the named appellant. (Tr. p. 10).

4. Once the defendant was in the ambulance, Officer Popelmayer approached the back of the ambulance. While standing at the back of the ambulance and at the feet of the appellant, Officer Popelmayer could smell the odor of an alcoholic beverage. (Tr. p. 11).

5. Based on the odor of alcohol, discussions concerning the accident from witnesses, and evidence from the accident scene,

Officer Popelmayer radioed Officer Hogan and requested that he meet the appellant at the hospital and place him under arrest for driving under the influence and witness the blood draw. (Tr. p. 12).

6. Upon arrival at LDS hospital, Officer Hogan located the appellant, placed him under arrest, read him the admonition concerning the consequences for refusing the comply with blood sample and then waited with the appellant for the blood technician to arrive to take the blood sample. (Tr. p. 18).

7. After the blood technician arrived, Officer Hogan asked the appellant for his consent to take a blood sample. The appellant consented and a sample was taken. Officer Hogan witnessed the blood draw and then read the appellant his Miranda rights. (Tr. p. 23).

8. On February 12, 1992, a suppression hearing was held. The hearing considered two motions submitted by the appellant. The first motion sought to suppress the blood test results based on a lack of probable cause to arrest and the second motion was a motion to dismiss. (Appellant's appendix 2).

9. After hearing the arguments of counsel and considering the authorities submitted, the court ruled that although there was insufficient probable cause to arrest the appellant, because the appellant voluntarily consented to the blood sample the blood tests results were admissible. (Tr. pp. 38-39).

10. Based on its findings, the court denied the appellant's motions. (Tr. pp. 40-47).

SUMMARY OF THE ARGUMENT

Evidence acquired subsequent to an invalid arrest is admissible where the State can establish that the evidence was seized pursuant to a voluntary consent and that the consent was obtained independent of the invalid arrest. In this case, although the appellant's arrest was found to be invalid for a lack of probable cause, because the appellant voluntarily consented to the blood sample and the consent was obtained independent of the arrest, the blood tests results are admissible. Accordingly, the trial court's denial of the appellant's motions to suppress the results and dismiss the case was not in error.

ARGUMENT

I. BECAUSE THE APPELLANT VOLUNTARILY CONSENTED TO THE BLOOD SAMPLE AND THE CONSENT WAS ACQUIRED INDEPENDENT OF THE INVALID ARREST, THE BLOOD TEST RESULTS ARE ADMISSIBLE.

The appellant contends that because the arrest was invalid, the blood test results should have been suppressed and the case dismissed. However, evidence acquired subsequent to invalid arrest is nevertheless admissible where the State can prove that the evidence was acquired by voluntary consent and that the consent was obtained independent of the invalid arrest. State v. Arroyo, 796 P.2d 684, 688-690 (Utah 1990).

Whether the consent was voluntarily depends on the "totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation." State v.

Strain, 779 P.2d 221, 225 (Utah 1989)(citing Schneckloth v. Bustamonte, 93 S.Ct. 2041 (1973)). Here, the trial court found that the appellant's consent was voluntary because it was given in the neutral environment of a hospital as opposed to a police station, and because no threats accompanied the request for the appellant's consent. (Tr. p. 39). Thus, because the trial court considered the surrounding circumstances under which the appellant's consent was made, the court's finding that the consent was voluntary is not clearly erroneous.

Likewise, the appellant's consent was acquired independent of the invalid arrest. The test used to determine whether the evidence was acquired independent of the prior illegality is whether the acquisition of the evidence was "sufficiently distinguishable to be purged of the primary taint." Arroyo, 796 P.2d at 690; (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, L.Ed. 441 (1963)). In this case, the appellant was already secured as a result of the injuries he suffered from the accident when his consent to the blood sample was requested. In other words, the appellant's arrest was not a pretext to the request for his consent. This was noted by the court in its findings that the appellant was not "going anywhere" when his consent was requested. (Tr. p. 39). Thus, the request for the appellant's consent to take a blood sample was independent from in the invalid seizure.

CONCLUSION

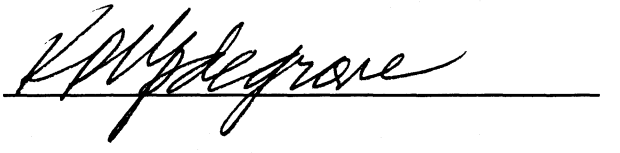
Because the appellant voluntarily consented to the blood sample and the consent was not acquired through the exploitation of the invalid arrest, the blood tests results are admissible despite the fact that the arrest was invalid for a lack of probable cause. Accordingly, because the blood test results are admissible the trial court's denial of the appellant's motions to suppress the blood test results and to dismiss case was not clearly erroneous. For these reasons, this Court should affirm the decision of the Third Circuit Court in denying the defendant's motions.

RESPECTFULLY submitted this 23rd day of ~~August~~ October, 1992.

JOE A. GREENLIEF
Attorney for Plaintiff/Appellee

CERTIFICATE OF DELIVERY

MAILED~~/DELIVERED~~ a copy of the foregoing to Larry Long, attorney for appellant, 39 Exchange Place, Suite 200, Salt Lake City, Utah 84111-2705, this 23rd day of ~~September~~ October, 1992.



In *Emery v. Emery*,[5] the California Supreme Court concluded that as between California domiciliaries involved in an automobile accident in Idaho, the law of their domicile should govern. The court's rationale was as follows:

> We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home.[6]

In *Schwartz v. Schwartz*,[7] a case identical on its facts, a husband and wife, both domiciliaries of New York, experienced an automobile accident in Arizona. The wife sued her husband in Arizona. Interspousal tort suits were not permitted in Arizona, but they were permitted in New York. The Arizona Supreme Court held that the law of the domicile had application and quoted with approval from *Clark v. Clark*[8] as follows:

> "[The] old rule is today almost completely discredited as an unvarying guide to choice of law decision in all tort cases.... No conflict of laws authority in America today agrees that the old rule should be retained.... No American court which has felt free to re-examine the matter thoroughly in the last decade has chosen to retain the old rule... It is true that some courts, even in recent decisions, have retained it.... But their failure to reject it has resulted from an unwillingness to abandon established precedent ... not to any belief that the old rule was a good one. [107 N.H. at 352,] 222 A.2d at 207 [citations omitted]."[9]

[1] We are persuaded by the rationale of the Restatement rule, *infra*, and the numerous jurisdictions which follow it. We therefore adopt the rule in Utah and reverse and remand with instructions to apply the law of the domicile on the issue of interspousal immunity.

II

[2] The remaining issue is whether plaintiff's action is barred for failure to give timely notice of claim. We conclude from the record before us that a genuine issue of material fact remains to be resolved, namely, whether the State is estopped to assert the lack of timely notice of claim.[10] This is to be seen in that the trial court specifically found that "there was unrefuted testimony by affidavit that the State of Utah denied through the Division of Personnel Management that Defendant Flinders was an employee of the State of Utah." Hence, on remand, plaintiff should be allowed to present evidence of her claim of estoppel.[11]

Reversed and remanded for further proceedings consistent with this opinion.

STEWART, DURHAM and ZIMMERMAN, JJ., concur.

HOWE, Associate Chief Justice (concurring and dissenting):

I concur in part I but dissent from part II of the majority opinion.

Utah Code Ann. § 63-30-12 (1986, Supp. 1988) requires that as a prerequisite to suing a state employee for an act or omission occurring within the scope of his employment, the plaintiff must, within one year after the claim arises, file a notice of claim with the attorney general and with the agency employing the employee. No attempt to comply with that statute was made here by plaintiff. She seeks to excuse herself from that requirement based on the affidavit of an investigator she hired who stated that seven months after the accident, he called the Division of Personnel Management of the State of Utah requesting confirmation of the state's employment of Ronald G. Flinders. He further stated that he was advised that no individual with that name was employed by the state according to its records. He apparently did not ask if there was such an employee with that name at the time of the accident.

That denial of employment, however, is entirely insufficient to support an estoppel against the state and excuse plaintiff from complying with the statute. This is because she had in her possession the accident report filed by the investigating police officer that defendant Flinders was driving a state-owned vehicle and that he was employed by a state agency whose address was 4501 South 2700 West, Salt Lake City, Utah 84119. She made no attempt to file a claim with any state agency at that address although there is a state office building there housing at least two state agencies, one of which is the Department of Public Safety, which was and is Flinders' employer. There is in the record an affidavit of an assistant in the personnel division of the Department of Public Safety stating that on the date of the accident, and at all times thereafter, Flinders' name was on the list of employees of that department, that any person could have contacted that department and received verification of Flinders' employment there, and that at all times since the date of the accident the Department of Public Safety has been housed in a building at 4501 South 2700 West, Salt Lake City, Utah 84119. In granting summary judgment in favor of Flinders, the trial court expressly found that

> [h]ad Plaintiff contacted the Personnel Division of the Department of Public Safety, she would have received verification of Defendant Flinders' employment status with that agency.

Not only did plaintiff fail to file a claim with the Department of Public Safety, she made no attempt whatever to file the claim with the attorney general. No excuse is offered for that omission except that plaintiff was not sure whether Flinders was a state employee. That is entirely insufficient as an excuse.

Since plaintiff always had all the information needed to file a timely claim with the Department of Public Safety and with the attorney general, I cannot escape the conclusion that as a matter of law, her failure to do so was not the fault of Flinders or the Department which will work an estoppel against them. Plaintiff's failure stems solely from her own unwillingness to make any effort to file based on information which she already possessed and which was always accurate. When she chose not to file, she assumed the risk of ignoring information in her possession.

5. 45 Cal.2d 421, 289 P.2d 218 (1955).
6. *Id.* at 428, 289 P.2d at 223.
7. 103 Ariz. 562, 447 P.2d 254 (1968).
8. 107 N.H. 351, 222 A.2d 205 (1966).
9. 103 Ariz. at 563, 447 P.2d at 255.
10. Rule 56(c) of the Utah Rules of Civil Procedure precludes summary judgment in the face of a genuine issue as to any material fact.
11. *See Rice v. Granite School District*, 23 Utah 2d 22, 456 P.2d 159 (1969).

STATE of Utah, Plaintiff and Appellee,

v.

Charles N. STRAIN, Defendant and Appellant.

No. 860531.

Supreme Court of Utah.

July 5, 1989.

Defendant was convicted by jury in the Fourth District Court, Utah County, George E. Ballif, J., of second-degree murder, a first-degree felony, and he appealed. The Supreme Court, Howe, Associate C.J., held: (1) detective's *Miranda* warning that defendant had right to have attorney appointed for him by court "at later date" was not defective; (2) defendant knowingly

and voluntarily waived his rights to remain silent and to counsel before and during interrogation; and (3) detective's threat of first-degree murder charge against him and possible execution if convicted and "guarantee" that defendant would be charged only with second-degree murder if he admitted his involvement was improper, and remand was warranted for determination of voluntariness of defendant's confession under totality of all the surrounding circumstances.

Case remanded.

Zimmerman, J., concurred and filed opinion.

1. Criminal Law ⇐412.2(3)

Detective's *Miranda* warning was not defective because it informed suspect that he had right to have attorney appointed for him by court "at a later date"; warning did not imply that attorney would not be available for him at initial interview, and suspect had no *Miranda* right to immediate appointment of counsel or warning to that effect.

2. Criminal Law ⇐412.2(5)

Defendant knowingly and voluntarily waived his rights to remain silent and to counsel before and during interrogation, without any intimidation, coercion or deception on part of detective in that regard; detective issued fresh warning before each interrogation, and defendant's responses thereto indicated his wish to speak. U.S. C.A. Const.Amend. 5.

3. Criminal Law ⇐520(2), 522(1)

Detective's threat of first-degree murder charge against defendant and possible execution if convicted of homicide of his step-daughter and his "guarantee"—which could have been construed as offer of promise of leniency—that defendant would be charged with second-degree murder if he admitted his involvement was improper, and remand was warranted for evidentiary hearing to determine voluntariness of defendant's confession under totality of all the surrounding circumstances; while coercive threats and promises were made to defendant, he also gave indications that officers' improper statements did not induce him to confess. U.C.A. 1953, 76–5–203.

Michael D. Esplin, Provo, for defendant and appellant.

David L. Wilkinson and David B. Thompson, Salt Lake City, for plaintiff and appellee.

HOWE, Associate Chief Justice:

Defendant Charles Nicholas Strain appeals his jury conviction of second degree murder, a first degree felony. Utah Code Ann. § 76–5–203 (1978, Supp.1988).

Defendant was arrested on February 20, 1986, in Scottsdale, Arizona, on a fugitive warrant issued in the state of Idaho. Upon arrest, Arizona detective Thomas Hill allegedly advised him of his *Miranda* rights. Four hours later, Detective Peter Bell of the Utah County, Utah, Sheriff's office questioned him about the shooting death of defendant's sixteen-year-old stepdaughter, Deanna, whose decomposed body had been found some five years earlier in Spanish Fork Canyon, Utah. Throughout this initial three-hour interview, defendant maintained his innocence with respect to that death. The following morning, Detective Bell resumed his questioning. This session was followed by another interrogation that evening by Detective Bell and also by Utah County Deputy Sheriff Scott Carter. The interrogation culminated in defendant's signing a statement, admitting the killing. He was subsequently charged with second degree murder.

Prior to trial, defendant filed a motion to suppress his confession. The motion cited inadequacies in the *Miranda* warning, as well as threats and promises made to him by Detective Bell which allegedly rendered his confession involuntary. This motion was granted by the trial court in view of inadequacies which it found in the *Miranda* warning given by Detective Bell. Subsequently, further evidence concerning defendant's arrest was discovered which prompted the trial court to reopen the hearing wherein Arizona Detective Hill testified that he did recite the *Miranda* warning to defendant upon his arrest on the Idaho charges. In response, the trial court vacated its order suppressing defendant's statements. At trial, defendant again objected to the admission of his confession into evidence on the grounds that the *Miranda* warning given by Detective Hill was inadequate and that the confession was coerced. The trial court overruled both objections and admitted the confession. In so doing, the court did not specifically address the voluntariness challenge which focused on the threats and promises made to defendant. Defendant was found guilty of second degree murder and sentenced to a prison term of five years to life.

I.

[1] Defendant maintains that the trial court erred in failing to suppress his confession because the *Miranda* warning by Detective Hill was defective. The *Miranda* warning originated out of the landmark United States Supreme Court case of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). That case outlined those basic rights of which the accused must be adequately informed before any of his statements made to law enforcement officers may be used as evidence against him.

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.

Miranda, 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

While *Miranda* is recognized as obligating police to follow certain procedures in their dealings with an accused, the decision did not prescribe that law enforcement officers adhere to a verbatim recitation of the words of the opinion. *Miranda*, however, did hold that "in the absence of a fully effective equivalent," statements made by a defendant could not be used as evidence against him. *Miranda*, 384 U.S. at 476, 86 S.Ct. at 1629, 16 L.Ed.2d at 725. Since *Miranda*, the United States Supreme Court has reaffirmed its intention of not extending the "rigidity" of that case to "the precise formulation of the warnings given a criminal defendant." *California v. Prysock*, 453 U.S. 355, 359, 101 S.Ct. 2806, 2807, 2809, 69 L.Ed.2d 696, 701 (1981) (per curiam). With this in mind, we examine the *Miranda* warning given to defendant upon his arrest.

Detective Hill testified at the reopened pretrial hearing on defendant's motion for suppression of his confession that he gave defendant the following *Miranda* warning:

> I said you have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning to be with you during questioning if you so desire. If you cannot afford an attorney, you have the right to have an attorney appointed for you by the court *at a later date*. Do you understand these rights?

(Emphasis added.)

Defendant argues that this warning implied that an attorney would not be available for him at the initial interview. He asserts that a *Miranda* warning must inform the accused that an attorney will be available immediately at the time of any interrogation. These conclusions are unwarranted. While the warning did inform defendant about the immediate unavailability of court-appointed counsel for him, we do not believe it carried any implication that he was required to submit to an interview with law enforcement officers without the presence of appointed counsel if he could not afford one. Furthermore, *Miranda* does not suggest that a suspect must be told he has the right to the immediate appointment of counsel:

> If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.
>
> This does not mean, as some have suggested, that each police station must

have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation.

Miranda, 384 U.S. at 474, 86 S.Ct. at 1628, 16 L.Ed.2d at 724; *see also Poyner v. Commonwealth*, 229 Va. 401, 409–10, 329 S.E.2d 815, 822–23, *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985).

Detective Hill's warning did not violate these principles. Defendant was informed of his right to counsel before and during any police interrogation. He was also informed of his right to remain silent. But the immediate right to counsel which defendant envisions is not within the scope of the *Miranda* decision. Once the accused requests court-appointed counsel, it is treated as a wish to remain silent, and the police cannot proceed to interrogate him until such counsel has been obtained or until defendant initiates the interview.

One additional point is helpful. In *California v. Prysock*, instances were examined where courts have held particular *Miranda* warnings inadequate in advising the accused of his right to court-appointed counsel. It concluded that *Miranda* warnings which "linked" the right of appointed counsel to some future point in time after the police interrogation violated *Miranda* principles. *Prysock*, 453 U.S. at 360, 101 S.Ct. at 2810. In some of these cases, the right to appointed counsel had been linked solely to appearances before the court, to the time when charges were to be filed, or to the time when the accused was transferred to another state. *United States v. Garcia*, 431 F.2d 134 (9th Cir.1970) (per curiam); *People v. Bolinski*, 260 Cal. App.2d 705, 67 Cal.Rptr. 347 (1968); *see also United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir.1972).

It is clear that Detective Hill's *Miranda* warning did not link defendant's right to counsel to any future point in time after police interrogation. The warning given by Detective Hill was the fully functional equivalent required by *Miranda*. Therefore, we hold that statements of defendant are not inadmissible due to a violation of *Miranda*.

II.

[2] Defendant next contends that he did not knowingly and voluntarily waive his privilege to remain silent and to have counsel before and during the interrogation. *Miranda* warnings were intended to guard against the inherently coercive nature of a custodial police interrogation by fully informing the suspect of the state's intention to use any self-incriminating statements to secure his conviction. *Moran v. Burbine*, 475 U.S. 412, 420, 106 S.Ct. 1135, 1140, 89 L.Ed.2d 410, 420 (1986). Once the accused has been so advised, he has the privilege of waiving these rights but must do so voluntarily, knowingly, and intelligently. *Miranda*, 384 U.S. at 444, 475, 86 S.Ct. at 1612, 1628, 16 L.Ed.2d at 707, 724. This is generally acknowledged as meaning that the waiver must have been the product of a "free and deliberate choice rather than intimidation, coercion or deception" and executed with "full awareness both of the nature of the right being abandoned and [of] the consequences of the decision to abandon it." *Moran*, 475 U.S. at 421, 106 S.Ct. at 1141, 89 L.Ed.2d at 421. Furthermore, this determination requires an examination of the "totality of the circumstances surrounding the interrogation." *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197, 212 (1979).

The record not only discloses defendant's full awareness of the consequences of his waiver but also the lack of intimidation, coercion, or deception on the part of Detective Bell in this regard. The following portions of the interrogation demonstrate this:

[Interview on the morning of February 27, 1986.]

Bell: Kind of like the rights, like I gave you last night, you know you don't have to, you don't have to say anything if you want to.

Strain: Well, I understand that. That's not any problem. I just didn't know the necessity of it.

Bell: Um hum. Kind of still holds true today, you know, when we're talking today the same thing goes as last night, you don't have to talk if you don't want to.

Strain: I've always known that. But sometimes all I do is make it worse and I found that out a long time ago, when you don't tell them what they want then they think the worst and that's when you're convicted of something you don't know nothing about. It happened to me twice before.

[Interview on the evening of February 27, 1986.]

Bell: [T]he number one thing I want to make sure again is that you are very well aware of your rights. You are going to hear them over and over again—I told you last night and I told you this morning.

Strain: That ain't going to make any difference.

Bell: But you do have the right to remain silent.

Strain: Hum um.

Bell: You don't have to answer any of our questions if you don't want to.

Strain: I know this.

Bell: If you feel you need your attorney present, the State of Arizona I'm sure will be glad to appoint one for you.

Strain: Ya, but that would just tie you up longer.

It is clear that defendant did voluntarily and knowingly waive his right to remain silent and his right to counsel before and during the interrogation. The trial court did not err in this respect by refusing to suppress defendant's inculpatory statements.

III.

[3] Defendant next contends that the trial court erred by failing to suppress his confession because it was obtained through coercion by Detective Bell. Such a claim, if valid, would render the confession involuntary as being violative of defendant's fifth and fourteenth amendment rights against self-incrimination. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Specifically, defendant contends that Detective Bell threatened a first degree murder charge against him and possible execution, if convicted of that charge, if he did not admit his involvement in the homicide of his step-daughter. Set alongside this threat was an alleged promise by Bell which offered defendant the lesser charge of second degree murder if he admitted involvement in the murder. Detective Bell denied making such a promise to defendant.

Over the years, both federal and state courts have struggled with the concept of voluntariness and have employed several formulations in their attempts to apply it. Several courts have stated that a confession of the accused must be the product or result of a "free and unconstrained choice." Other courts have defined the concept of voluntariness by insisting that the confession be "freely self-determined," or the product of "rational intellect and free will." Another perspective frames the issue as "whether the defendant's will was overborne at the time he confessed." *See United States v. Gordon*, 638 F.Supp. 1120, 1144 (W.D. La.1986), *cert. denied*, 482 U.S. 908, 107 S.Ct. 2488, 96 L.Ed.2d 380 (1987) (citations omitted). As required in an examination of a waiver of *Miranda* rights, the determination of voluntariness of confessions requires the court to consider "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, 862 (1973); *State v. Hegelman*, 717 P.2d 1348 (Utah 1986); *State v. Moore*, 697 P.2d 233 (Utah 1985). The mere representation to a defendant by officers that they will make known to the prosecutor and to the court that he cooperated with them, *United States v. Shears*, 762 F.2d 397 (4th Cir. 1985), or appeals to the defendant that full cooperation would be his best course of action, *United States v. Pomares*, 499 F.2d 1220, 1222 (2d Cir.), *cert. denied*, 419 U.S. 1032, 95 S.Ct. 514, 42 L.Ed.2d 307 (1974), have been recognized as not coercive. However, as the State freely admits in the

instant case, most courts have found a confession involuntary where a threat to pursue a higher charge if the accused did not confess, or a promise to pursue a lesser charge if he did confess, was exhortative. *United States v. Tingle*, 658 F.2d 1332, 1335–37 (9th Cir.1981); *State v. Rhiner*, 352 N.W.2d 258, 262–63 (Iowa 1984).

The record indicates that during the course of the February 27, 1986 morning interrogation, Detective Bell made the following statement to defendant:

> Now, what I'm trying to tell you right now Charlie is, all you have to do, all you've got to do ... the only thing that is keeping you from going back to the State of Utah and looking at a possible execution on a first degree murder charge or a second degree murder charge, which is some jail time. The only thing that keeps between them two, is "yes, I did or no I didn't." Yes, second degree murder, no, *I didn't, I will* prove that you did and you are looking at a possible execution date in the State of Utah. That's all I want to hear from you Charlie, all I want to hear is yes or no. All I want to hear is, is there going to be first degree murder or second degree murder. I don't want to hear, "No I didn't have nothing to do with it," because I can prove it and I'm going to prove it. I'll go back to the State of Utah today, the County Attorney is going to file....

Later, Detective Bell repeated this line of interrogation.

> Utah is, and Utah is going to bring you back down. Charlie we're going to try you for murder. So, just tell me right now, let's just (not understandable), yes for jail time or no, are we going to go to trial and for possible execution. That's all I want to hear from you is just yes or no.

Defendant immediately asked, "Just that simple?" Upon this response, Detective Bell then framed his dichotomous proposal into what easily would have been taken as an offer of a promise of leniency:

> Just that simple. *And I can guarantee it Charlie, I can guarantee it's that simple.* My God, this thing has been drug on for five years. The little girl's body up in the canyon, the soul was crying for justice.

(Emphasis added.)

Not only did Detective Bell threaten a first degree murder charge and possible execution if convicted, we believe that he also crossed the line when he offered defendant a promise as evidenced by his personal guarantee. The detective's offer was framed strictly in terms which offered defendant a second degree murder charge and jail time for his "yes, I did." Adding to his proposal the dimension of leniency, Bell informed defendant of the potential first degree murder charge against him and possible execution upon conviction if he refused his guaranteed offer.

Upon Bell's extension of this promise of leniency, defendant attempted to relate his philosophy of life but was interrupted by Detective Bell: "I don't want to hear it Charlie. All I want to hear is yes or no." After a few sympathetic comments by Detective Bell concerning defendant's hard life, Bell continued to press:

> Well, you are [trying to snow the law enforcement] by not telling me yes or no, because I know, Charlie, I know. Okay, I'm just going to tell you right out flat, I know. And all I have to do is prove it to twelve jurors in the State of Utah. All you have to do is just make an affirmative that, yes, you know too, or no, you don't know and we'll have a trial. That's all I'm asking for.

Soon after this statement, Detective Bell offered defendant a moment to think. Then after one final push by Bell, defendant began to admit his involvement in the murder which eventually resulted in a signed statement that evening admitting culpability for the killing.

It is clear that the statements made by Detective Bell to defendant were impermissibly coercive because they carried a threat of greater punishment or a promise for lesser punishment depending on whether he confessed. The State, however, urges us to affirm the admission of the confession because looking at the "totality of all the surrounding circumstances," the improper statements of Detective Bell did not induce defendant to confess. The State points out that defendant was an adult in his forties and familiar with the criminal justice system. Certain statements made by defendant in the course of the interrogation indicated that he little cared whether he lived or died. He stated that he had "no life left"; that he did not care if he were executed; and that he cared only about the persons he would leave behind.

While in *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897), the statement was made that any threat or promise, however slight, renders a confession involuntary and inadmissible, later cases do not repeat that rigid rule but follow the totality of all the circumstances test. In *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), the Court found that a guilty plea made by an accused was not rendered involuntary by the sole fact that the statute under which he was charged permitted imposition of the death sentence only upon a jury's recommendation and thereby made the risk of death the price of a jury trial. This death penalty provision had earlier been held to be unconstitutional in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), because it imposed an impermissible burden upon the exercise of a constitutional right. Notwithstanding the coercive effect of the statute in effect at the time the defendant in *Brady* entered his guilty plea, the Court, in a later proceeding brought by Brady to set aside his guilty plea, looked at all of the relevant circumstances surrounding the entry of the plea and found that there were other valid considerations which prompted its making, viz., a co-defendant had given a confession, decided to plead guilty, and became available to testify against Brady. See also *People v. Conte*, 421 Mich. 704, 365 N.W.2d 648 (1984), where the Supreme Court of Michigan rejected the strict per se test sometimes attributed to *Bram v. United States*, and adopted "the simple rule that a confession *caused* by a promise of leniency is involuntary and inadmissible." (Emphasis added.)

In the instant case, the trial court did not address defendant's contention that even though an adequate *Miranda* warning had been given to him, his subsequent confession was the result of coercive threats and promises made by the interrogating officers. We therefore do not have before us an adequate record upon which we can determine the question of voluntariness. There is no testimony of defendant as to what considerations prompted his confession. As earlier stated, while coercive threats and promises were made to him, he also made statements which indicate that the improper statements of the officers did not induce him to confess.

We therefore remand this case to the trial court for an evidentiary hearing to determine the voluntariness of defendant's confession under a "totality of all the surrounding circumstances." If the confession is found to have been voluntarily given, the conviction is affirmed. However, if the confession is found to have been involuntarily made, a new trial should follow.

HALL, C.J., and STEWART and DURHAM, JJ., concur.

ZIMMERMAN, Justice (concurring):

I join in the majority opinion. However, in the absence of some statement as to how we view the record before us, our remand for a determination of the question of voluntariness raises the possibility of an avoidable additional appeal and remand. As the majority notes, the detective's comments were plainly outside the bounds of permissible interrogation and were, on their face, coercive. Moreover, the transcripts demonstrate that defendant's confession was made immediately after these coercive statements. For the benefit of the trial court and the parties, I think we should indicate that while the State has contended that "it may be *possible* ... to find ... that Bell's improper statements did not actually induce defendant to confess" (emphasis added), if such a finding were based on nothing more than the evidence presented to us at this point, there

would be some doubt as to such a finding's sustainability.

William ANDREWS, Petitioner,

v.

Eldon BARNES, as Warden of the Utah State Prison, Respondent.

No. 890359.

Supreme Court of Utah.

Aug. 18, 1989.

Certiorari Denied Oct. 30, 1989.
See 110 S.Ct. 354.

Prisoner brought habeas corpus petition. The Supreme Court held that: (1) state's exercise of peremptory challenge to excuse prospective black juror was not based on juror's race, and (2) any error in testimony of witness during penalty phase of trial was harmless.

Petition denied.

Durham and Zimmerman, JJ., dissented in part.

1. Habeas Corpus ⇐898(3)

Good cause existed for addressing issue of whether state exercised peremptory challenge against juror on the basis of the juror's race, even though there had been previous petitions for writs of habeas corpus, where issue did not arise until testimony given by judge before Board of Pardons.

2. Jury ⇐120

State's exercise of peremptory challenge against black juror was not based on juror's race; prospective juror was law enforcement officer who stated that he believed that persons charged with crimes he investigated were guilty, that he believed his fellow officers believed the same, and some of his fellow officers were scheduled to appear as witnesses.

3. Criminal Law ⇐1177

Any error in testimony of witness at penalty phase of trial, that three persons who had been convicted of first-degree murder and subsequently released from state prison had again committed murder was insufficient to have played any role in jury's determination of penalty, and was harmless.

Timothy K. Ford, Seattle, Wash., Gordon G. Greiner, Mary V. Stolcis, Sandra Goldman, Patricia A. Rooney, Denver, Colo., Robert M. Anderson, Salt Lake City, for petitioner.

Robert R. Wallace, T.J. Tsakalos, Daniel S. McConkie, Salt Lake City, for respondent.

PER CURIAM:

[1] This case is here as a petition for a writ of habeas corpus. As a result of the testimony given by Judge Robert Newey, who had been the prosecutor in the trial of William Andrews, the question has been raised in this petition whether the State exercised one of its peremptory challenges against a juror in the trial of this matter on the basis of the juror's race. Since the issue did not arise until the testimony given by Judge Newey before the Board of Pardons, there is good cause under rule 65B(i)(4), Utah Rules of Civil Procedure, which warrants addressing the issue on its merits even though there have been previous petitions for writs of habeas corpus filed in this Court. *Hurst v. Cook*, 777 P.2d 1029 (1989).

[2] Although a superficial reading of Judge Newey's testimony before the Board of Pardons might lead one to conclude that the exercise of the peremptory challenge was based on race, the trial transcript of the actual voir dire examination casts the matter in a different light. The putative juror, a law enforcement officer who exhibited commendable forthrightness, stated that he believed that those persons who had been charged with crimes as a result of his investigations were in fact guilty. He also stated that he believed that his fellow officers on the Ogden police force believed the same. It is clear from the transcript of the voir dire questioning, that some of those officers were scheduled to appear as witnesses in the trial of this matter. Counsel for co-defendant Dale Selby Pierre moved to remove the juror, James H. Gillespie, Jr., for cause. That motion was expressly joined by counsel for William Andrews. The trial judge denied the motion. Mr. Newey then indicated a willingness to agree to the striking of Mr. Gillespie so that no peremptory challenges would have to be used by defendants to remove him. The trial court indicated a willingness to do so if all the parties would stipulate to the removal of Mr. Gillespie. Counsel for Keith Roberts, another co-defendant, however, refused. As a result Mr. Gillespie was passed for cause.

Based on this portion of the transcript, it appears that the State's reason for being willing to stipulate to the removal of Mr. Gillespie and later for the exercise of a peremptory challenge to strike him from the venire was to protect against possible error and a subsequent appeal that might be based on that issue. In all events, the record is undisputed that counsel for William Andrews clearly agreed to the removal of Mr. Gillespie after the motion to strike for cause was denied. Having twice sought to remove Mr. Gillespie from the jury panel, William Andrews cannot now claim that he was somehow prejudiced by the State's removal of Mr. Gillespie. For these reasons, we do not believe that petitioner's constitutional rights were in any way prejudiced.

[3] Petitioner also asserts that error was committed in the penalty phase of the trial by virtue of the fact that a witness testified that three persons who had been convicted of first degree murder and subsequently released from the state prison had again committed murder. Petitioner asserts that the testimony was inaccurate in that only one of those persons can be shown to have committed murder. Even if petitioner's allegation is accurate, we do not believe that the error was sufficient to have played any role whatsoever in the jury's determination of the appropriate penalty under the circumstances.

Justices DURHAM and ZIMMERMAN dissent with respect to the Court's ruling on the striking of juror James H. Gillespie from the jury panel. They would issue a stay of execution of sentence and refer the peremptory challenge issue to the district court for an evidentiary hearing before addressing the merits of the petition. They view the prosecutor's statement before the Board of Pardons as raising a factual issue about the basis for the decision of the peremptory challenge.

The petition for habeas corpus is denied.

William ANDREWS, Petitioner,

v.

Pete HAUN, as Chairman of the Utah Board of Pardons; Victoria Palacios and Ed Kimball, as members of the Utah Board of Pardons; the Utah Board of Pardons; and Eldon Barnes, as Warden of the Utah State Prison, Respondents.

No. 890360.

Supreme Court of Utah.

Aug. 18, 1989.

Original Proceeding in this Court.

Timothy K. Ford, Seattle, Wash., Gordon G. Greiner, Mary V. Stolcis, Sandra Goldman, Patricia A. Rooney, Denver, Colo., Robert M. Anderson, Salt Lake City, for petitioner.

Robert R. Wallace, T.J. Tsakalos, Daniel S. McConkie, Salt Lake City, for respondents.

PER CURIAM:

This case is here as a petition for extraordinary relief. It appears from the incomplete submission of the parties, both

scope of our capacity to order her removal pursuant to either of those provisions.

The motion for summary disposition is granted, and the petition to remove is dismissed.

HALL, C.J., HOWE, Associate C.J., and STEWART and ZIMMERMAN, JJ., concur.

STATE of Utah, Plaintiff and Respondent,

v.

Jose Francisco ARROYO, Defendant and Petitioner.

No. 890128.

Supreme Court of Utah.

June 28, 1990.

Defendant in a drug prosecution moved to suppress cocaine seized from his automobile. The Court of Appeals, 770 P.2d 153, reversed the grant of defendant's motion to suppress, and remanded. Certiorari was granted. The Supreme Court, Stewart, J., held that: (1) the prosecutor's assertion that the search was consensual was not evidence and could not support a finding of consent, and (2) the officer's stop of defendant for following too closely was a pretext to search for drugs.

Court of Appeals' decision reversed and remanded.

Hall, C.J., concurred in the result.

1. Criminal Law ⇐1158(1)

Standard of review for trial court's finding of fact is that finding should not be set aside unless it is clearly erroneous. Rules Civ.Proc., Rule 52(a).

2. Criminal Law ⇐1158(1)

Finding of fact made by trial court must be rejected if it is not supported by substantial, competent evidence. Rules Civ.Proc., Rule 52(a).

3. Criminal Law ⇐1181.5(7)
Searches and Seizures ⇐197

Prosecutor's affirmative response to judge's question of whether search was consensual was not evidence, and could not support finding of consent; thus, case was required to be remanded for evidentiary hearing on issue of consent. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐192

Burden of establishing existence of exception to search warrant requirement is on prosecution. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ⇐180

To establish consent exception to search warrant requirement, State must demonstrate that consent was voluntary. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐194

When prosecution attempts to prove voluntary consent after illegal police action (e.g., unlawful arrest or stop), prosecution has much heavier burden to satisfy than when proving consent to search which does not follow police misconduct. U.S.C.A. Const.Amend. 4.

7. Automobiles ⇐349.5(3)

State trooper's stop of defendant's automobile for following too closely was pretext to search for drugs; under totality of circumstances, reasonable officer would not have stopped defendant and cited him for following too closely except for some unarticulated suspicion of more serious criminal activity. U.S.C.A. Const.Amend. 4.

8. Searches and Seizures ⇐182

In determining whether consent to search is lawfully obtained following initial police misconduct, inquiry should focus on whether consent was voluntary and whether consent was obtained by police exploitation of prior illegality. U.S.C.A. Const. Amend. 4.

9. Criminal Law ⇐394.4(1)

Exclusionary rule protects not only those accused of crime but also those whose only "crime" may be fitting "profile" which police use to determine whom to search.

10. Searches and Seizures ⇐186

Search supported by voluntary consent which is not exploitation of primary police illegality may still be found invalid if search exceeds scope of consent. U.S.C.A. Const.Amend. 4.

Walter F. Bugden, Salt Lake City, for defendant and petitioner.

R. Paul Van Dam and Sandra L. Sjogren, Salt Lake City, for plaintiff and respondent.

STEWART, Justice:

This case is here on a writ of certiorari to review a decision of the court of appeals. The case presents important issues concerning the effect of consent searches and pretextual traffic stops under the Fourth Amendment to the United States Constitution.

I. FACTS

On September 15, 1987, at about 4 p.m., Utah Highway Patrol Trooper Paul Mangelson was driving southbound on Interstate 15 near Nephi, Utah. Mangelson had completed his shift an hour earlier and was driving home when he observed a northbound pickup-camper on the opposite side of the freeway. Mangelson made a U-turn through the freeway's median strip and quickly caught up with the pickup which was the last vehicle in a group of two or three cars. Mangelson followed the pickup and then pulled beside it to observe its occupants and gauge its speed. The pickup's two occupants were both Hispanic, and the truck had out-of-state license plates. Mangelson stopped the pickup and cited Arroyo, the driver, for following too close and driving with an expired license.

Mangelson asked Arroyo's consent to search the truck, and Arroyo agreed.[1] The search uncovered approximately one kilogram of cocaine inside the passenger-side door panel of the pickup. Arroyo was arrested and charged with possession of a controlled substance with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(i) (1986).

Arroyo moved to suppress the evidence on the ground that the traffic stop was a pretext for searching the truck for evidence of a more serious crime. The trial court found that the testimony at the suppression hearing "established the probability that no [traffic] violation occurred, and that the alleged violation was only a pretext asserted by the trooper to justify his stop of a vehicle with out-of-state license plates and with occupants of Latin origin." The trial court also ruled that the "[d]efendant consented to the search of the vehicle." Nevertheless, the court granted Arroyo's motion and ordered suppression of the evidence. The State filed an interlocutory appeal in the court of appeals challenging the suppression order.

II. THE COURT OF APPEALS DECISION AND THE SUPPRESSION HEARING

The court of appeals held that the traffic stop was "an unconstitutional pretext." *State v. Arroyo*, 770 P.2d 153, 155 (Utah Ct.App.1989). The court stated, "We are persuaded that a reasonable officer would not have stopped Arroyo and cited him for 'following too closely' except for some unarticulated suspicion of more serious criminal activity." 770 P.2d at 155.

In addressing the issue of consent raised by the prosecution, the court of appeals found that defense counsel had blocked the prosecution's efforts to establish that Arroyo had consented to the search and had "[misled] the State and the [trial] court by stipulating that consent was given," thereby preventing the prosecution from exploring the voluntariness of the consent. The

1. The defendant admits in his brief the facts stated in the text, but does not admit that the "consent" given by the defendant was "voluntary" under the appropriate legal standard.

court of appeals concluded that Arroyo had consented to the search and that the "consent" was "voluntary" and reversed the trial court's suppression order. 770 P.2d at 156.

Two paragraphs of the court of appeals' opinion are the crux of its resolution of this case:

> In this regard, we note Arroyo did not contest the State's argument at the suppression hearing that he voluntarily consented to the search of his truck. Arroyo, through his counsel[,] stipulated that he consented to the search. Arroyo's counsel objected when the State attempted to offer evidence to establish Arroyo's consent was voluntary, claiming it was not relevant as the only issue was whether the original stop was a pretext. As a result, the trial court limited testimony concerning the circumstances surrounding Arroyo's consent. The trial judge specifically found that Arroyo consented to the search of his truck, and there is nothing in the record to contradict this finding.
>
> For the first time on appeal, counsel now argues that Arroyo's consent was not voluntary as there was no "break in the causal connection between the illegality and the evidence thereby obtained." *United States v. Recalde*, 761 F.2d 1448, 1458 (10th Cir.1985). However, this argument should have been made below. A defendant cannot mislead the State and the court by stipulating that consent was given, thus preventing the State from exploring the circumstances of the consent, and then argue for the first time on appeal that the consent given was not voluntary. Based on these circumstances, we conclude that defendant's stipulation included that the consent was given voluntarily.

770 P.2d at 156.

The court of appeals misconstrued the record. The only time consent was mentioned at the suppression hearing occurred during the testimony of Trooper Mangelson:

> Q. [by the prosecutor, Mr. Eyre]: Upon the vehicle stopping, what did you immediately do then?
> A. I approached the vehicle. I asked for a driver's license. I made as many observations about the vehicle as I could.
> Q. Describe what you observed.
> A. I observed—
> MR. BUGDEN [defense counsel]: Your Honor, for the record I think I would object to any further inquiry at this point. My motion only goes to the propriety and the lawfulness of the stop. And I think if that is what—
> THE COURT: Was this a consent search?
> MR. EYRE: Yes, Sir.
> THE COURT: I think that is true, Counsel. It goes strictly to the stop.
> MR. EYRE: Okay.
> Q. Anything else about the stop that you recall that you have not previously testified to?
> A. I don't believe so.

The court of appeals' opinion states, "Arroyo's counsel objected when the State attempted to offer evidence to establish Arroyo's consent was voluntary...." 770 P.2d at 156. The transcript of the suppression hearing reveals that prior to the objection by Arroyo's counsel, no mention had been made of consent and that the objection was made to a question concerning what observations Trooper Mangelson made as he approached Arroyo's vehicle. Defense counsel did not utter a word about voluntary consent during the course of the proceedings. Furthermore, as the court of appeals' opinion correctly states, it was the trial judge, not defense counsel, who "limited testimony concerning the circumstances surrounding" the issue of consent. 770 P.2d at 156.

[1, 2] The court of appeals stated that the trial court found that "Arroyo consented to the search of the truck, and there is nothing in the record to contradict this finding." 770 P.2d at 156. Finding No. 18 in the trial court's findings and conclusions does state, "The Trooper requested permission to search the Defendant's vehicle, and the Defendant consented to the search of the vehicle." However, the court of appeals applied the wrong standard of review in evaluating this finding. The standard of review for a trial court's finding of fact is that a finding shall not be set aside unless it is clearly erroneous. Utah R.Civ.P. 52(a); *State v. Walker*, 743 P.2d 191, 193 (Utah 1987); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2573, at 689 (1971); *see also State v. Maurer*, 770 P.2d 981, 983 (Utah 1989). A finding not supported by substantial, competent evidence must be rejected. *50 W. Broadway Assoc. v. Redevelopment Agency*, 784 P.2d 1162, 1171 (Utah 1989).

[3] The only "evidence" anywhere in this record which supports the finding of consent is the prosecutor's response to the judge's question about consent.[2] However, a prosecutor's assertion that consent was given is not evidence and cannot support a finding of consent. *See, e.g., Stading v. Equilease Corp.*, 471 So.2d 1379, 1379 (Fla. Dist.Ct.App.1985); *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So.2d 1015, 1017 (Fla.Dist.Ct.App.1982) ("[Attorneys'] unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations...."); *see also Caperon v. Tuttle*, 100 Utah 476, 484, 116 P.2d 402, 405–06 (1941); *see generally* 88 C.J.S. *Trial* § 181a, at 355 (1955). It follows that the trial court's finding of consent is clearly erroneous. The court of appeals' conclusion about consent is also erroneous.

In short, the record simply does not support the court of appeals' conclusion about the issue of consent. The record contains no suggestion that defense counsel "[misled] the State and the court" on the issue of consent and the record reveals no evidence concerning consent and no stipulation regarding consent. Consent should have been explored at the suppression hearing, but it was the trial court, not defense counsel, who preempted the prosecution's efforts to reach the issue. Therefore, the court of appeals was wrong in reversing the trial court's suppression order. Instead, the case should be remanded for an evidentiary hearing on the issue of consent.

2. The court of appeals' opinion asserts that defense counsel stipulated "that consent was given." 770 P.2d at 156. However, no stipulation on any issue by defense counsel appears anywhere in the record of this case.

III. ADMISSIBILITY OF EVIDENCE OBTAINED IN A CONSENT SEARCH FOLLOWING POLICE ILLEGALITY

Since this case must be remanded for an evidentiary hearing, it is appropriate to define the parameters of the consent issue which should be explored by the trial court. *See, e.g., State v. Tarafa*, 720 P.2d 1368, 1370 (Utah 1986); *Lopes v. Lopes*, 30 Utah 2d 393, 395, 518 P.2d 687, 688 (1974).

A. Exceptions to Warrant Requirement

[4, 5] Searches conducted "outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (citations omitted); *State v. Harris*, 671 P.2d 175 (Utah 1983). The burden of establishing the existence of one of the exceptions to the warrant requirement is on the prosecution. *Harris*, 671 P.2d at 178. To establish the consent exception, the state must demonstrate that the consent was voluntary. *United States v. Carson*, 793 F.2d 1141, 1149 (10th Cir.), *cert. denied*, 479 U.S. 914, 107 S.Ct. 315, 93 L.Ed.2d 289 (1986); *State v. Iacono*, 725 P.2d 1375, 1377 (Utah 1986); *State v. Whittenback*, 621 P.2d 103, 106 (Utah 1980).

B. Validity of Consent Following A Police Illegality

[6, 7] When the prosecution attempts to prove voluntary consent after an illegal police action (e.g., unlawful arrest or stop), the prosecution "has a much heavier burden to satisfy than when proving consent

to search" which does not follow police misconduct. *United States v. Melendez-Gonzalez*, 727 F.2d 407, 414 (5th Cir.1984) (citing *United States v. Ballard*, 573 F.2d 913, 916 (5th Cir.1978)). In this case, a law enforcement officer precipitated events which led to the search of Arroyo's vehicle. The trial court found that Trooper Mangelson's stop was not a lawful traffic stop but rather a pretext to allow Mangelson to investigate the car and its occupants. The court of appeals agreed, stating that under the totality of the circumstances, "a reasonable officer would not have stopped Arroyo and cited him for 'following too closely' except for some unarticulated suspicion of more serious criminal activity." 770 P.2d at 155. The trial court and the court of appeals were clearly correct on this issue—Trooper Mangelson's stop was an unconstitutional pretext.[3]

In cases involving the admissibility of evidence obtained as a consequence of police misconduct, the United States Supreme Court has eschewed a "but for" test. Under such a test, all evidence that would not have been discovered but for the initial police misconduct would be suppressed. In *Wong Sun v. United States*, 371 U.S. 471, 487–88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963), the Supreme Court expressly declined to hold "that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *See also Dunaway v. New York*, 442 U.S. 200, 217, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824 (1979); *Brown v. Illinois*, 422 U.S. 590, 603, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975). Justice Powell has stated that the Court's rejection of a "but for" test in *Wong Sun* "recognizes that in some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes." *Brown*, 422 U.S. at 608–09, 95 S.Ct. at 2264 (Powell, J., concurring in part). Therefore, under certain circumstances, evidence obtained after police misconduct may be admissible.

[8] Two factors determine whether consent to a search is lawfully obtained following initial police misconduct. The inquiry should focus on whether the consent was voluntary and whether the consent was obtained by police exploitation of the prior illegality. Evidence obtained in searches following police illegality must meet both tests to be admissible. 3 W. LaFave, *Search and Seizure* § 8.2(d), at 190 (2d ed.1987).

1. Voluntary consent

The case law holds that a consent which is not voluntarily given is invalid. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 233, 93 S.Ct. 2041, 2050, 36 L.Ed.2d 854 (1973); *United States v. Carson*, 793 F.2d 1141, 1149 (10th Cir.), *cert. denied*, 479 U.S. 914, 107 S.Ct. 315, 93 L.Ed.2d 289 (1986); *State v. Valdez*, 748 P.2d 1050, 1056 (Utah 1987); *State v. Whittenback*, 621 P.2d 103, 106 (Utah 1980). Generally, whether the requisite voluntariness exists depends on "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of" police conduct. *Schneckloth*, 412 U.S. at 226, 93 S.Ct. at 2047; *see also State v. Strain*, 779 P.2d 221, 225 (Utah 1989).

2. Exploitation of primary illegality

A second factor is whether consent was obtained through police exploitation of the primary or antecedent police illegality. A few courts have not accepted the second factor. The Tenth Circuit in *United States v. Carson*, 793 F.2d 1141 (10th Cir.), *cert. denied*, 479 U.S. 914, 107 S.Ct. 315, 93 L.Ed.2d 289 (1986), focused exclusively on the voluntariness of the consent in determining whether the taint of the prior police illegality had been purged. The court stated:

> We hold that *voluntary* consent, as defined for Fourth Amendment purposes, is an intervening act free of police exploitation of the primary illegality and is sufficiently distinguishable from the primary illegality to purge the evidence of the primary taint.
>
> ....
>
> ... The exploitation issue focuses solely on defendant's *grant* of consent, not on the bare request, or the reasons underlying it. While the police may exert coercion in the *manner* in which they *request* defendant's consent, the request itself, even if motivated by the fruits of the prior illegality, is not exploitation.

793 F.2d at 1147–49 (emphasis in original). The Utah Court of Appeals followed this approach in *State v. Sierra*, 754 P.2d 972 (Utah Ct.App.1988). However, we disagree with the rule established in *Sierra* because it fails to give proper weight to Fourth Amendment values, and we address the issue of the proper standard to be applied in this jurisdiction under the second prong of the analysis.

Professor LaFave has stated, "The apparent and unfortunate conclusion in *Carson*, therefore, is that exploitation can never occur in the sense of the illegal search strongly influencing police in thereafter seeking a particular consent, but only in the sense of bringing added pressure to bear upon the person from whom the consent is sought." 3 W. LaFave, *Search and Seizure* § 8.2(d), at 19–20 n. 88.1 (Supp. 1990). For example, under *Carson*, police have power to conduct warrantless searches without probable cause and then use the fruits of illegal searches by obtaining a voluntary consent after the search has already occurred. Police should not be permitted to ratify their own illegal conduct by merely obtaining a consent after the illegality has occurred.

Indeed, *Carson* seems to be antithetical to the purpose of the exclusionary rule. In *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960), the Supreme Court stated, "[The rule's] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." A further purpose of the exclusionary rule implicated here, as enunciated in *Terry v. Ohio*, 392 U.S. 1, 13, 88 S.Ct. 1868, 1875, 20 L.Ed.2d 889 (1968), is to prevent making a court a "party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." Neither of these purposes is effectuated by ignoring police misconduct, which is what the *Carson* approach encourages.

[9] The exclusionary rule protects not only those accused of a crime but also those whose only "crime" may be fitting a "profile" which police use to determine whom to search. In *United States v. Miller*, 821 F.2d 546 (11th Cir.1987), the Eleventh Circuit stated:

> The record does not reveal how many unsuccessful searches Trooper Vogel has conducted or how many innocent travelers the officer has detained. Common sense suggests that those numbers may be significant. As well as protecting alleged criminals who are wrongfully stopped or searched, the Fourth Amend-

3. The following findings of fact justify the conclusion that the stop was a pretext:

> 8. As a result [of] Trooper Mangelson's training at [a] seminar, he admitted that whenever he observed an Hispanic individual driving a vehicle he wanted to stop the vehicle. The Trooper also admitted that once he stopped an Hispanic driver, 80% of the time he requested permission to search the vehicle.
>
> ....
>
> 14. Under cross-examination, the Trooper denied that it was his normal procedure when issuing a citation to an individual for "Following too Close" to record the license plate of the front car. However, the Trooper's denial on this point was contradicted by tape recorded testimony from the Trooper at the preliminary hearing held in this matter. The Trooper admitted that he had not recorded the license plate number of the front car in this case.
>
> 15. The Defendant testified that he was at least 85 to 95 feet or nine car lengths, behind the vehicle immediately in front of his own. The Court finds this testimony to be credible.
>
> 16. In contrast, the Court is unpersuaded that Trooper Mangelson rightfully determined that the Defendant was "Following too Close" or that any other attested facts preponderated to the level necessary to permit a constitutional stop of the Defendant's vehicle. Moreover, the Court finds that the Trooper's own testimony established the probability that no violation of law occurred, and that the alleged violation was only a pretext asserted by the Trooper to justify his stop of a vehicle with out of state license plates and with occupants of Latin origin.

ment of the Constitution protects these innocent citizens as well.

821 F.2d at 550.

The basis for the second part of the two-part analysis is found in the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), which stated that a trial court must determine in such a case "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" 371 U.S. at 488, 83 S.Ct. at 417 (quoting Maguire, *Evidence of Guilt* 221 (1959)). The "fruit of the poisonous tree" doctrine has been extended to invalidate consents which, despite being voluntary, are nonetheless the exploitation of a prior police illegality.

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), is an example of the application of the second part of the two-part test. In *Royer*, a suspect who matched a drug courier profile was detained at an airport by two police officers who requested and retained the suspect's airline ticket and driver's license. The officers asked Royer to accompany them to a room, later characterized as a "large storage closet," in the airport. The officers retrieved Royer's luggage from the airline and obtained Royer's consent to open and search the luggage. The search uncovered narcotics. The trial court subsequently found that Royer's consent was "freely and voluntarily given" and therefore denied a suppression motion. The Supreme Court held that the detention of Royer constituted an illegal seizure. 460 U.S. at 507, 103 S.Ct. at 1329. Without questioning the assertion that Royer's consent was "freely and voluntarily given," the plurality opinion concluded that "the consent was tainted by the illegality and was ineffective to justify the search." 460 U.S. at 507–08, 103 S.Ct. at 1329. Thus, the exploitation of the illegality of the detention was the determinative factor, despite the voluntariness of the consent.

Similarly, in *People v. Odom*, 83 Ill.App.3d 1022, 39 Ill.Dec. 406, 404 N.E.2d 997 (1980), the court held that the defendant was illegally arrested by police who lacked sufficient probable cause to effect an arrest. The defendant had given officers consent to search a jacket in a vehicle. The officers found drug paraphernalia. The trial court held that "the items found pursuant to the search of [the] jacket were not the fruit of [the] illegal arrest but were, rather, obtained as a result of ... voluntary consent," which the trial court stated was an "independent intervening" factor. 83 Ill.App.3d at 1025, 39 Ill.Dec. at 409, 404 N.E.2d at 1000. The appellate court agreed that the consent was voluntary but stated:

> However, a finding that the defendant's consent to search was voluntarily given is but one step in the determination of the propriety of the search, because even if the consent were voluntary it still may have been obtained by the exploitation of an illegal arrest.... Therefore, the question before us is whether Odom's consent was obtained by the exploitation of an illegal arrest, or "by means sufficiently distinguishable to be purged of the primary taint."

83 Ill.App.3d at 1027–28, 39 Ill.Dec. at 411, 404 N.E.2d at 1002 (quoting *Brown v. Illinois*, 422 U.S. 590, 599, 95 S.Ct. 2254, 2259, 45 L.Ed.2d 416 (1975)).[4] The court held that the consent had been tainted because police illegally arrested the defendant at gunpoint, even though there was no indication he was armed and less than a minute separated the arrest and the consent. On this basis, the court reversed the defendant's conviction.

Numerous other courts have adopted the same basic analysis. *See, e.g., United States v. Miller*, 821 F.2d 546 (11th Cir. 1987); *United States v. Melendez-Gonzalez*, 727 F.2d 407, 414 (5th Cir.1984) ("In addition to proving valid and voluntary consent to search, the Government must also establish the existence of intervening factors which prove that the consent was sufficiently attenuated from the illegal stop."); *United States v. Thompson*, 712 F.2d 1356, 1361 (11th Cir.1983) ("Because [defendant] was illegally detained when he gave his consent ... the district court's conclusion that [the] consent was voluntary is insufficient to validate the seizure and search. [Defendant's] consent must also be untainted by the illegal detention."); *United States v. Taheri*, 648 F.2d 598, 601 (9th Cir.1981) ("[E]vidence found as a result of ... consent must nonetheless be suppressed if the unconstitutional conduct was not sufficiently attenuated from the subsequent seizure...."); *United States v. Hearn*, 496 F.2d 236, 243–44 (6th Cir.), *cert. denied*, 419 U.S. 1048, 95 S.Ct. 622, 42 L.Ed.2d 642 (1974) ("[I]nformation gained by law enforcement officers during an illegal search cannot be used in a derivative manner to obtain other evidence...."); *State v. Cates*, 202 Conn. 615, 621, 522 A.2d 788, 791 (1987) ("[T]he mere fact a *consent* to a search or a seizure is voluntary does not necessarily remove the taint [of a prior illegality]." (Emphasis in original.)); *State v. Raheem*, 464 So.2d 293, 297 (La.1985) ("When made after an illegal detention or search, consent to search, even if voluntary, is valid only if it was the product of a free will and not the result of an exploitation of the previous illegality."); *State v. McKenzie*, 440 A.2d 1072, 1077 (Me.1982) ("[T]he obvious connection between the invalid stop and the seizure of [the evidence] has not been dissipated by the defendant's consent to search...."); *People v. Borges*, 69 N.Y.2d 1031, 1033, 517 N.Y.S.2d 914, 916, 511 N.E.2d 58, 59 (1987) ("Although the voluntariness of the consent is an important factor in the court's determination of attenuation, it is not dispositive...."); *Reyes v. State*, 741 S.W.2d 414, 431 (Tex.Crim.App.1987) ("The better test is, of course, that evidence obtained by the purported consent should not be held admissible unless it is determined that the consent was both voluntary and not an exploitation of the prior illegality.").

4. In analyzing whether an exploitation of a primary illegality has occurred, many courts use the criteria listed by the Supreme Court in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). *See, e.g., State v. Cates*, 202 Conn. 615, 621–23, 522 A.2d 788, 792–93 (1987); *People v. Odom*, 83 Ill.App.3d 1022, 1028, 39 Ill.Dec. 406, 411, 404 N.E.2d 997, 1002 (1980); *State v. Mitchell*, 360 So.2d 189, 191 (La.1978); *State v. McKenzie*, 440 A.2d 1072, 1077 (Me. 1982); *People v. Borges*, 69 N.Y.2d 1031, 1033, 517 N.Y.S.2d 914, 916, 511 N.E.2d 58, 59–60 (1987); *Reyes v. State*, 741 S.W.2d 414, 431 (Tex.Crim.App.1987). *Brown* concerned the question of when a confession is the fruit of a prior illegal arrest. The Court rejected a per se rule that the giving of *Miranda* warnings is a sufficient break in the chain of events between the arrest and the confession. 422 U.S. at 603, 95 S.Ct. at 2261. In so doing, the Court stated reasons which are also applicable to a consent to search which is preceded by a police illegality:

> Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment.
>
> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

422 U.S. at 601–03, 95 S.Ct. at 2260–61 (citations omitted). The Court concluded that *Miranda* warnings were only one factor to be considered. 422 U.S. at 603, 95 S.Ct. at 2261. The Court listed "temporal proximity of the arrest and the confession, the presence of intervening circumstances [and] the purpose and flagrancy of the official misconduct" as relevant factors in such cases. 422 U.S. at 603–04, 95 S.Ct. at 2261–62. Professor LaFave has stated that similar factors are applicable to consent to search cases. 3 W. LaFave, *Search and Seizure* § 8.2(d), at 193–94 (2d ed.1987). These factors should be considered in determining if there has been an exploitation of the primary illegality in such cases.

In sum, we hold that the court of appeals' adoption of the *Carson* test in *Sierra* was erroneous.

IV. SCOPE OF CONSENT

[10] Finally, a search supported by voluntary consent which is not an exploitation of the primary illegality may still be found invalid if the search exceeds the scope of the consent. Professor LaFave stated:

> When the police are relying upon consent as a basis for their warrantless search, they have no more authority than they have been given by the consent.
>
> ....
>
> Assuming ... that a general and unqualified consent was given, then the boundaries of the place referred to mark the outer physical limits of the authorized search. Even within those limits, however, the police do not have carte blanche to do whatever they please. Certainly they may not engage in search activity which involves the destruction of property, and this would seem to bar breaking into locked containers.

3 W. LaFave, *Search and Seizure* § 8.1(c), at 160–61 (2d ed.1987); *see, e.g., State v. Koucoules*, 343 A.2d 860, 867 (Me.1974) ("[A] general consent to search ... would not ... sanction ... the tearing down of walls....").

Here, there is nothing in the record that suggests what the limits of Trooper Mangelson's search were.

V. CONCLUSION

In sum, the decision of the court of appeals is reversed, and the case is remanded to the trial court for an evidentiary hearing to determine the voluntariness of the consent, whether the consent was an exploitation of the illegal stop, and the scope of the consent.

Reversed and remanded.

HOWE, Associate C.J., and DURHAM and ZIMMERMAN, JJ., concur.

HALL, C.J., concurs in the result.

B & A ASSOCIATES, Plaintiff,

v.

L.A. YOUNG SONS CONSTRUCTION COMPANY, and Reliance Insurance Company, Defendants.

RELIANCE INSURANCE COMPANY, Third-Party Plaintiff and Appellee,

v.

UTAH DEPARTMENT OF TRANSPORTATION, Third-Party Defendant and Appellant.

No. 880239.

Supreme Court of Utah.

July 23, 1990.

State highway contractor sought to enforce supplemental agreement purportedly intended to compensate it for underrun of riprap. The Third District Court, Salt Lake County, Richard H. Moffat, J., entered judgment enforcing agreement, and state appealed. The Supreme Court, Hall, C.J., held that: (1) supplemental agreement was valid and binding contract, but (2) material fact issues existed as to state's claim for reformation or rescission based on unilateral mistake.

Reversed in part and remanded for further proceedings.

1. Judgment ⇐181(2, 3)

Summary judgment is granted when no genuine issue of material fact exists and moving party is entitled to judgment as a matter of law; where there is material issue of fact, summary judgment is inappropriate.

2. Highways ⇐113(3)

Supplemental agreement intended to compensate state highway contractor for underrun of riprap in excess of 25% was valid and binding contract even though it was never physically delivered to contractor; agreement bore all necessary signatures of state officials and clearly stated that "signing this agreement settles any and all claims on contract item [riprap]."

3. Judgment ⇐181(19)

Material fact issues existed as to whether state highway department's chief construction officer realized at time he signed supplemental agreement intended to compensate contractor for underrun of riprap that contract item pertaining to riprap was related to unbalanced item for "clearing and grubbing," and thus whether signing amounted to unilateral mistake which could serve as basis for reformation or rescission, precluding summary judgment for contractor on claim under agreement.

R. Paul Van Dam, Donald S. Coleman, and Leland D. Ford, Salt Lake City, for Utah Dept. of Transp.

Robert F. Babcock and Michael C. Van, Salt Lake City, for B & A Associates.

Paul R. Howell, Clark B. Fetzer, and Mark R. Madsen, Salt Lake City, and David Hughes, Mission Viejo, Cal., for L.A. Young Sons Const. Co. and Reliance Ins. Co.

HALL, Chief Justice:

This case involves only Reliance Insurance Company (Reliance) as appellee and Utah Department of Transportation (UDOT) as appellant and is on appeal from a grant of a partial summary judgment in favor of Reliance in the Third Judicial District Court, Salt Lake County. The trial court held that no genuine issues of material fact existed with respect to a supplemental agreement between Reliance's assignor, L.A. Young Sons Construction Company (Young), and UDOT compensating Young for fixed costs and overhead incurred by a 63.9 percent underrun on a UDOT project.

FACTS

On April 23, 1985, UDOT began accepting bids on a project to reconstruct a portion of Interstate 80 near Black Rock in Tooele County, Utah (the project). On May 13, 1985, Young was awarded the bid and contracted with UDOT to perform all construction work on the project for the approximate sum of $9,940,893.25.

Reliance furnished both payment and performance bonds for Young on the project. In addition, Young entered into continuing agreements of indemnity with Reliance pursuant to which Reliance is assigned any claims or causes of action Young may have in connection with the project.

Included in Young's bid was a cost estimate for the placement of 226,200 tons of "riprap." Young initially subcontracted the riprap work to B & A, which bid $5 per ton to Young. Young in turn bid only $4 per ton on its master bid schedule. The bid was based on a quantity estimate supplied by UDOT engineers and relied upon by all contractors who submitted bids.

Also included in Young's bid was a cost estimate for "clearing and grubbing" that was well in excess of UDOT's estimate. While UDOT estimated $5,000 for clearing and grubbing and the average bid submitted by contractors was $38,052, Young's bid was $832,420. This inflated bid was attributed to "unbalanced bidding," a practice whereby contractors attempt to mask or hide their cost structure from competitors by overbidding some aspects of the project and underbidding others. Unbalanced bidding is also utilized to attempt to meet increased funding needs at particular intervals in the project.

Young was awarded the bid under condition that Young accept payment for the clearing and grubbing in stages. After Young accepted this condition, UDOT sought approval to award the unbalanced contract from the Federal Highway Administration (FHWA), which administered the federal highway funds used in the project. FHWA raised some concerns about the quantity of riprap specified by the UDOT engineers, but after receiving verification from UDOT's district director, FHWA concurred in the bid award to Young as proposed by UDOT.